IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 188

UNITED CONSTRUCTION WORKERS, affiliated with the UNITED MINE WORKERS OF AMERICA; DISTRICT 50, UNITED MINE WORKERS OF AMERICA, and UNITED MINE WORKERS OF AMERICA, *Petitioners,*

v.

LABURNUM CONSTRUCTION CORPORATION.

On Writ of Certiorari to the Supreme Court of Appeals of Virginia

PETITIONERS' REPLY BRIEF

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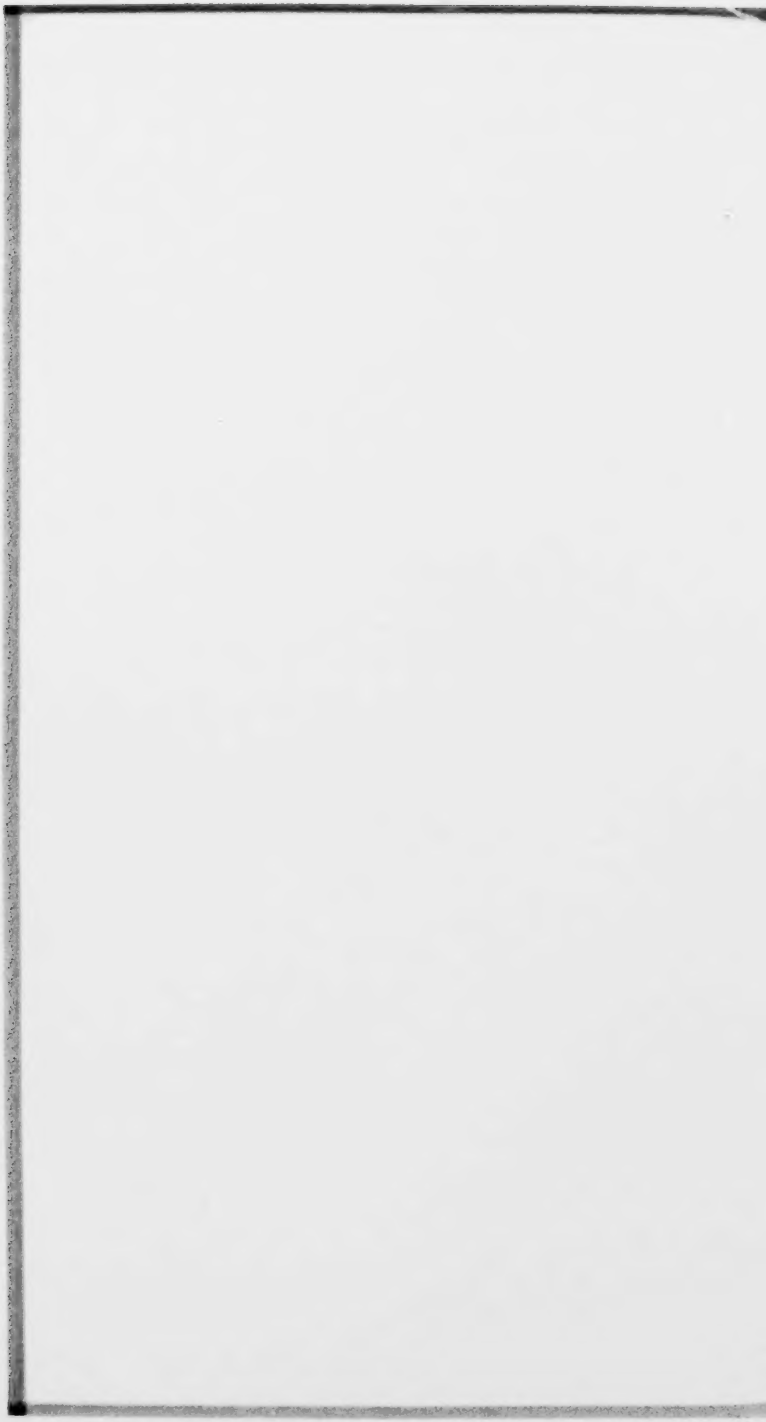

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PETITIONERS' REPLY BRIEF

No attempt will be made to reply *seriatim* to the arguments advanced in the opposing brief, the answers to which, Petitioners submit, are contained in their original brief. In addition to such discussions, the Court's attention is directed to the following particular matters. Peti-

tioners will follow the heading numerals used in the Laburnum brief.

I.

Laburnum does not disagree with Petitioners' contention in their original brief (pp. 30-32) that the type of conduct found by the Virginia Supreme Court to have been carried out by Petitioners falls within the activity interdicted by Section 8 (b)(1)(A) of the Act. Laburnum seeks to avoid the impact of Petitioners' argument by its thesis (Brief 14-17) that the instant action "concerns only the right of an employer to do business free from violence and coercion" and that the "wrong done to Laburnum" was by physically forcing it to stop doing business in Kentucky through acts directed not only against its "'employees' but against all who worked for it." Petitioners submit, however, that the essence of Laburnum's claim, and the Virginia Supreme Court's findings of responsibility, concerned only the intimidation and coercion of Laburnum's employees. It was the conduct directed at Laburnum's employees that grounded the Virginia Supreme Court's affirmance of Petitioners' liability. Laburnum's position is inconsonant with the jury's determination and with the Virginia Supreme Court's findings.

The question posed by this Court in granting certiorari is limited to "the type of conduct found by the" Virginia Supreme Court "to have been carried out by Petitioners". Laburnum's President admitted there were no acts of violence[1] and witnesses who testified concerning the alleged

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[1] In the case at bar Bryan himself, Laburnum's president, testified as follows (R. 803-804):

Q. Mr. Bryan, during the period from July 26 through August 5, when you were out in Breathitt County and in that general neighborhood, did anybody shoot at you?

A. Nobody shot at me, that I know of.

Q. Did anybody try to beat you?

A. No, nobody made a pass at me.

Q. And you went all through that country day and night, which you say is so wild, and you were the head of the business that the

threats towards Delinger (Laburnum's superintendent), discussed in Laburnum's brief (p. 16) attributed such statements to "spotters" *who were never identified.* Laburnum's thesis (Brief 14-17) to sustain the state court's jurisdiction is challenged by its pattern for liability in its pleadings and in its offered instructions, given to the jury[2], and by the Virginia Supreme Court in its findings of fact.

A ready reply to Laburnum's charge (brief, 15) that the Act makes no mention of an employer's right to engage in his business "free from threats, assault and battery,

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trouble was about, and no one offered to interfere with you or to stop you in any way did they?

A. Mr. Hart threatened to.

Q. I asked if anybody did stop you or if anybody did prevent you from going around.

A. No, nobody actually did it.

Q. Nobody offered you any violence of any kind while you were going around on the roads and all?

A. It depends on what you mean by offering violence. If that means threatened violence, I would say yes. If it doesn't the answer is no.

Q. Were any of your employees beat up?

A. I didn't hear of anybody getting a mauling.

Q. Was anybody shot at?

A. No, I didn't hear that anybody got shot at.

Q. Was any property destroyed?

A. No, I didn't hear of any property being destroyed.

Q. Were any automobiles overturned?

A. No, I didn't hear of it that I know of.

Q. In other words it was all talk and no action.

A. Well, I guess you just don't understand the situation out there. When they tell you not to do something, you had better not do it.

Q. Yet nobody was hurt, nobody was shot at.

A. I tried to get my people to go back to work by every way known to man, and I couldn't do it.

This is clear and emphatic evidence from the head of the Laburnum corporation that there was no violence during the course of this dispute. He attempts to imply that there were threats of violence, but this is a mere conclusion on his part based upon his thought that "when they tell you not to do something, you had better not do it". At no time did Bryan testify as to any threat made directly to him that he would be subjected to any personal violence.

[2] See Petitioners' original brief pp. 6-7.

libel, slander, larceny and highway robbery" is that the instant case is not concerned with such matters but with allegations and findings of coercion and intimidation of Laburnum's employees. Section 8 (b)(1)(A) is concerned therewith. Similarly Laburnum's advertence to the alleged threats to Delinger and his widow's right to damages (brief, 17) have no relevancy to the instant case, for the reasons that there is no finding thereon by the Virginia appellate court and, as expressed in *Hughes* v. *Superior Court,* 339 U.S. 460, 469: "We do not go beyond the circumstances of the case. Generalizations are treacherous in the application of large constitutional concepts".

II.

A.

Laburnum erroneously asserts that the question for decision "is whether by the mer inclusion of Section 8 (b)(1)(A)" in the Act, Congress has ousted state jurisdiction over torts, for in addition to such inclusion the legislative history of that section and other provisions of the Act are vital criteria demonstrating that state courts' jurisdiction is precluded in common law tort actions based upon conduct which falls within proscribed activity of Section 8 (b)(1)(A).

1 and 2.

Laburnum's argument (brief, 21) that the "Act does not say that only the Board may adjudicate in situations which contain elements of unfair labor practices" and that from Section 10 (a) of the Wagner Act Congress deleted the words "this power shall be exclusive" make reference appropriate to *Amazon Cotton Mill Co.* v. *Textile Workers Union,* 4 Cir., 167 F. 2d 183, 187, where it stated:

> "* * * As pointed out above, however, a remedy in the courts not expressly given is not to be inferred; and especially is this true where Congress has worked

out elaborate administrative machinery for dealing with the whole field of labor relationships, a matter requiring specialized skill and experience, and has provided for the handling of unfair labor practices by an administrative agency equipped for the task. The change in the statute upon which reliance is placed was clearly intended, not to vest the courts with general jurisdiction over unfair labor practices, but to recognize the jurisdiction vested in the courts by section 10, subsections (j) and (l), section 208, and section 303, to which we have heretofore made reference, as well as the power in the Board conferred by the proviso in section 10(a) to cede jurisdiction to state agencies in certain cases. This is not only the clear meaning of the statute when its language is considered in the light of existing law, but it is also the meaning given it by the Conference Committee of the House and Senate (See H.R. No. 510, June 3, 1947)."

The assertion in Laburnum's brief (p. 24) that in enacting Section 8 (b)(1)(A) of the Act "Congress sought to outlaw those coercive acts *which were not unlawful in the States*," is not supported by, and is inconsistent with, the legislative debates. See Petitioners' original brief, pages 40-45. Demonstrating Laburnum's error is the quotation in Laburnum's brief (p. 26) which contains the statement that "*Some of these acts* are illegal under State law." Furthermore, the quotation by Senator Ball (Laburnum's brief, 27) from 93 Cong. Rec. 4137, Legis. Hist., 1019, dealt with *economic* coercion as distinguished by Senator Ball from "violence and that sort of thing."

The legislative history of the Act condemns Laburnum's contention (brief p. 32) that "Section 8 (b)(1)(A) was intended . . . primarily to insure that representation elections would be free from coercive tactics" and "not intended as a substitute for common law torts."

Laburnum parenthetically states (brief, 24), "[This is the unfair labor practice which Petitioners now claim they committed.]" Petitioners denied that they had committed any wrongful conduct; the jury and the Virginia Supreme

Court found that they had committed acts which petitioners have shown to be unfair labor practices. Petitioners' complaint is that the issue of wrongful conduct fell within the exclusive primary jurisdiction of the Board. Similarly, Laburnum says (brief, 4) that "it has been determined that no legitimate labor activity was involved, and that Petitioners committed the acts charged against them . . . maliciously, intentionally, wilfully, and without regard to the rights of Laburnum, its officers, its employees or anyone else." While the latter portion of the statement goes beyond the issues of the case, determination of whether the labor activity was legitimate was a matter for the Board and not for a state court jury.

3.

Laburnum's argument (brief, 32) that "Other Extrinsic Evidentiary Factors Do Not Indicate an Intent to Preclude the Exercise of State Jurisdiction Over Torts" cites no such *evidentiary* factors. Citations in Laburnum's brief to support its contention that Congress has not precluded state court jurisdiction for common law torts do not sustain its position, for in the instant case Congress has regulated the very type of conduct upon which Petitioners' responsibility is grounded. Where Congress has so exercised its constitutional authority by regulating such conduct—that is, the subject matter—its regulation itself shows that Congress has preempted that field, and any assertion that Congress intended that the states should have concurrent jurisdiction would require definitive proof of such an intendment. In *California* v. *Zook*, 336 U. S. 725 (1949), wherein the Court's majority opinion rejected federal preemption because "there were no state laws to displace when Congress acted" (p. 735), Mr. Justice Burton, in a dissenting opinion, noted that (p. 749):

> "Once Congress has lawfully exercised its legislative supremacy in one of its allotted fields and has not accompanied that exercise with an indication of its con-

sent to share it with the states, the burden of overcoming the supremacy of the federal law in that field is upon any state seeking to do so."

Laburnum assiduously avoids any attempt to answer Petitioners' contentions (original brief, 40-45) concerning deletions from the Hartley Bill which would have authorized damage actions for unlawful concerted activities of the type involved herein, as well as the contentions that the Act's specific provisions for damage actions which Congress regarded as permissive manifest clear congressional intent to preclude other damage actions, and that the Act itself denotes the limits of state jurisdiction. Laburnum offers no answer—because there is none—to Petitioners' reference to this Court's recognition in *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 398, that Congress had embodied in the Act "congressional direction as to the role that states were to play in the area of labor regulation covered by the Federal Act". (See Petitioners' original brief, 45-47).

Contrary to Laburnum's assertion (brief, 34), Petitioners submit that the instant case does "lie in a field where the Federal interest is dominant," and makes *Hines* v. *Davidowitz*, 312 U.S. 52, applicable to the instant case as support for Petitioners' contentions. The contention that this case "lies within a field which is reserved to the States in the Federal Constitution" was answered adversely to Laburnum almost twenty years ago and is so firmly established in both federal and state jurisprudence as to render citation of authority unnecessary. See, however, *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1. Nor is there substance in Laburnum's view that "control [of the field] is necessary for the existence of State governments". Such argument could be persuasive if this were a case where the sovereignty of state or city authority in the exercise of its police authority was being challenged; but petitioners submit preservation of state sovereignty is not dependent,

as Laburnum urges, upon state court jurisdiction to enforce private rights under common-law principles in the labor relations field.

B.

To sustain the state court's jurisdiction, Laburnum argues that the "Board is empowered to *prevent* future unfair labor practices, *not to adjudicate* damages caused by past activities." Initially, Laburnum's argument overlooks this Court's pronouncement in *Garner* v. *Teamsters, etc. Union,* 346 U.S. 485, 98 L. Ed. (Adv. op. 161, 169) that conflict which precludes state court jurisdiction "lies in remedies, not rights". Furthermore, Section 10(c) empowers the Board to enter such order as will effectuate the policies of the Act, thus enabling an order of the Board to have an impact not only as to future activities but past activities as well.

Laburnum's argument (brief, 36), that the "Board is not concerned, nor are its processes hampered by the fact that the guilty Petitioners are also required by a State court, acting under State law to pay damages to the party injured by their wrongs", is fully answered by this Court's pronouncement against the conflict of remedies in *Bethlehem Steel Co.* v. *New York Labor Board,* 330 U.S. 767, and the *Garner* case. See also Petitioners' original brief (pp. 49, 50-52).

Nor is there any merit to Laburnum's position that because violent conduct may be subject to state criminal processes, it follows, as Laburnum contends (brief, 37), that Petitioners "be required to pay damages". As demonstrated in Petitioners' original brief, the legislative history of Section 8 (b)(1)(A) is indicative of congressional intent to allow prosecutions under the state criminal process and procedures but such history and other provisions of the Act demonstrate that Congress did not intend that a common law tort action, such as the instant one, could be prosecuted in a state court. These criteria challenge

Laburnum's contentions. Laburnum's argument offends this Court's pronouncement in *Prigg* v. *Pennsylvania*, 16 Pet. 539, 617, approved in *New York C. R. Co.* v. *Winfield*, 244 U. S. 147, 153, that "the legislation of Congress in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the matter."

As stated in Ratner, Problems of Federal-State Jurisdiction in Labor Relations, New York University Fifth Annual Conference on Labor, 77, 95:

> "... the propriety of state court relief does not turn on whether the claim is predicated upon state law or upon the national act. The test, rather, is whether the transaction involved is in the 'field' covered by the national act. If so, the rights to which it gives rise flow exclusively from Federal law; *substantive rights as well as remedies flowing from State authority are superseded.* (Emphasis supplied).

C.

Laburnum cites *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 793, but fails to mention that the Court, in that case, sustained the position that Congress has preempted the field in the situation with which that case was concerned. The majority opinion noted (p. 783) that "The rule that statutes in derogation of the common law are to be strictly construed does not require such an adherence to the letter as would defeat an obvious legislative purpose or lessen the scope plainly intended to be given to the measure."

The contention of Laburnum that exclusion of state jurisdiction in the situation presented herein would be repugnant to and in violation of the due process of law clause of the Fifth Amendment to the Constitution of the United States is untenable. It is well settled that there is no vested right in the continued existence of a common-law rule. 16 C.J.S., Subject, Constitutional Law, Section 223. It must be remembered that in 1949, when the alleged

wrongful conduct occurred, the Federal statute which superseded Laburnum's right to sue in a state court for damages had been in effect for substantially two years, so that Laburnum had no vested right in any action for damages. In *Mondou* v. *New York, New Haven and Hartford Railroad Company,* 223 U.S. 1, this Court recognized the well-established principles that no one has any vested right in any rule of the common law and that a congressional act which supersedes a common law remedy under state law is not violative of the due process of law clause of the Fifth Amendment to the Federal Constitution. See also *New York C.R. Co.* v. *Winfield, supra; Arizona Copper Company* v. *Hammer,* 250 U.S. 400. Neither is there any merit to Laburnum's assertion that it was without a substantial right to redress by some effective procedure, for Congress in the Labor Management Relations Act provided procedures which Laburnum could have, but did not utilize, to protect its alleged rights against the alleged interference by Petitioners.

D.

1 and 2.

Counsel for Laburnum, in quoting Ratner, Federal-State Jurisdiction, *supra,* p. 77, 106, failed to include Ratner's observation that "if the integrity of the Congressional decision to occupy the field is to be preserved, the States cannot be permitted to duplicate *or supplement* protection accorded by the Act to the rights which Congress guaranteed *under the guise* of applying general, rather than labor-relations oriented, laws and policies."

Reliance is also had upon a quotation from Cox and Seidman's "Federalism and Labor Relations", 64 Harvard Law Review 211, but counsel for Laburnum do not quote therefrom (p. 240) the following:

> "For State law cannot be the measure of the scope of 'concerted activities' while the boundaries of that

phrase mark the limits of a Federal right. *The State courts can no longer apply their common law doctrines to labor disputes affecting commerce.*" (Emphasis supplied)

The statement in Laburnum's brief (p. 41) that "All Authority Support Retention of State Jurisdiction of Torts" is challenged by *McNish* v. *American Brass Co., et al.*, 139 Conn. 44, 89 A. 2d 566, Cert. Den. 344 U.S. 913; *Norris Grain Co.* v. *Nordaas*, 232 Minn. 91, 46 N.W. 2d 94 (1950); *Ryan* v. *Simons*, 100 N.Y.S. 2d 18 (1950), aff. 98 N.E. 2d 707, cert. den. 342 U.S. 897. See also *Schatte* v. *International Alliance, etc.*, 9 Cir., 182 F. 2d 158, wherein the 9th Circuit rejected an action for damages based on alleged violation of Section 8 (b)(1) of the Act upon its provision that exclusive remedy therefor was in Board proceedings "except in so far as the District Courts are given jurisdiction over certain suits for injunctions brought by the Government and over suits brought by private parties under Sections 301 and 303" of the Act. In *Direct Transit Lines* v. *Teamsters' Union*, 29 LRRM 2492 (D. C. Mich. 1952), in which an employer brought suit in a Michigan Court seeking damages and an injunction to restrain a secondary boycott and which was removed to the Federal Court, it was held that the Michigan anti-monopoly statute was superseded by the Act in so far as the anti-monopoly statute might be applied to cover the same ground as the Federal Act. In sustaining the Federal Act's supersedure the Court said "the fact that the Taft-Hartley Act applies to and prohibits the acts alleged to have been committed is of itself sufficient to deny the applicability or relevance of state law covering the same acts." See *Direct Transit Lines, Inc.* v. *Local Union, etc.*, 6 Cir., 199 F. 2d 89 (1952).

Of the cases which Laburnum has cited to sustain state court jurisdiction (brief, 45, footnote 11): *Art Steel Co.* v. *Velasquez*, 280 App. Div. 76, 111 N.Y.S. 2d 198, in approving state court jurisdiction, the court observed (p.

201) that "The Taft-Hartley Law contains no reference to violence as a ground for action by the National Labor Relations Board" and directed (p. 202) that steps should be taken to ascertain whether the Board desires to act with respect to" the basic dispute involved. In *Grist* v. *Textile Workers Union,* R.I. , 82 A. 2d 402, there was no issue of the conflict of federal and state jurisdiction.

The remainder of said cited cases are not common law tort actions, such as the one brought by Laburnum, but are injunction cases or contempt proceedings stemming from injunctive decrees. These injunction cases, Petitioners submit, do not support Laburnum's contention that the Virginia court had jurisdiction to hear and determine the private right issues in a common law tort action for damages. In some of such cases it appeared that the rights of the public, in addition to those of the employers, were involved. See *Williams* v. *Cedartown Textiles, Inc.,* 208 Ga. 659, 68 S. E. 2d 705; *Missouri* v. *Thatch,* 361 Mo. 190, 234 S.W. 2d 1. Moreover, the legislative history of the Act militates against the correctness of the results in those cases for it is not reasonable to assume that Congress intended to afford to private litigants the right of injunction in state courts when it unequivocally denied such right in the federal courts. Although in *Kuzma* v. *Millinery Workers Union,* 27 N.J. Sup. 579, 99 A. 2d 833, the court approved state court jurisdiction, it is doubtful that the factual situation consisted of an unfair labor practice so as to invoke the preemption doctrine, but it is noteworthy that the New Jersey court's decision is clearly based upon its unwillingness to yield its jurisdiction. Likewise, the Alabama court, in *Russell* v. *United Auto Workers,* 64 So. 2d 384, gave no consideration to the fact that the Act specifies the instances in which damage actions may be brought for violations of the Act and the courts in which such actions are to be prosecuted; and that court, noting there is "no authoritative holding from the Supreme

Court on the matter now before us", also observed that it "would prefer that the Supreme Court of the United States express its judgment on the question before committing the Supreme Court of Alabama to a profound change in law . . . " Both *Kuzma* and *Russell* were tort actions.

Laburnum notes (Brief, 45) that at least 32 states have statutes of general application protecting the right to work from coercive interference, gives no citations in support of that assertion but argues (Brief, 46) that a "decision against state jurisdiction here would largely nullify all of the state statutes." Of course, a decision against state jurisdiction would apply only where interstate commerce is concerned; but Laburnum's observation that there is a great number of state statutes focuses the importance of the policy of Congress in establishing a paramount single agency so as to have uniformity of regulation, expertness and specialization of administration, and guaranty that public interest rather than private rights will be the basis for decision. The language of the National Labor Relations Board's brief in the *Garner* case is apropos and reads:

> "Thus at each step of this case, petitioners invoked procedures different from those provided for in the Act, and obtained rulings at variance with those which might have been elicited from the Board. Clearly, there can be no uniformity of regulation, no specialization and expertness of administration, and no guarantee that public rights rather than private interests will be the basis of decision if private parties may have recourse to local tribunals for relief against the very conduct which Congress has prohibited. As the Court of Appeals for the Fourth Circuit has pointed out in the analogous case involving an effort by a private party to enforce the National Labor Relations Act in a federal district court (*Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183, 190):

> 'More than two hundred local tribunals of general jurisdiction would be clothed with the special jurisdiction now vested in a unified agency with nation-wide jurisdiction over labor controversies; and it is not difficult to foresee the confusion that would necessarily result. Certainly the statute should not be given an interpretation which would lead to such consequences.'
>
> "The mischief warned against by the Fourth Circuit with respect to an overlapping of federal court jurisdiction in the field of unfair labor practices would of course be infinitely multiplied if a similar jurisdiction were extended to state courts as well."

Since the instant cause of action is grounded in events which allegedly occurred in Kentucky, and Petitioners asserted (R. 80), and it was not challenged, that "the substantive law governing the case was the law of Kentucky", it is noteworthy that the Kentucky statute [Baldwin's Kentucky Revised Statutes Annotated (1942)] provides:

> "Section 336.130
>
> (1) Employees may, free from restraint or coercion by the employers or their agents, associate collectively for self-organization and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare. Employees collectively and individually may strike, engage in peaceful picketing, and assemble collectively for peaceful purposes.
>
> (2) Neither employers or their agents nor employees or associations, organizations or groups of employees shall engage or be permitted to engage in unfair or illegal acts or practices or resort to violence, intimidation, threats or coercion."

This statutory provision was given by the trial court to the jury (Instruction 1A, R. 129-130). In addition thereto, the statutory law of Kentucky provides for federal procedure:

"Section 336.150. Conciliation of labor disputes; joint wage agreement; Federal jurisdiction to supersede.

* * * * * *

(3) . . . Nothing in KRS 336.130, 336.150 or 399.200 shall apply where the authority of a Federal agency has been invoked or a Federal agency assumes jurisdiction. * * * "

Thus, it is submitted, the public policy of Kentucky recognizes federal supersedure. Also pertinent is the declaration of the Sixth Circuit in *International Union of Operating Engineers* v. *Dahlem Construction Co.*, 6 Cir., 193 F. 2d 470, 475, in damage action based upon the Act, that "Kentucky law does not control, for Congress has occupied the field and has closed it to state regulation."

E.

Laburnum argues (Brief 37-38, 46) that state court jurisdiction should be sustained because the Mine Workers ignored the procedures of the Board and employed force to accomplish their end. But the issue herein is not whether state courts have jurisdiction because Petitioners did not seek Board procedures, but rather whether, because of the Act, Congress has precluded state court jurisdiction to entertain an employer's common law tort action for damages based upon conduct interdicted by the Act—the answer to which is not dependent upon whether Petitioners did or did not seek Board action.

CONCLUSION

For the reasons assigned and discussed herein and in Petitioners' opening brief, Petitioners submit the question presented in this case should be given an affirmative answer.

Appendix C in Laburnum's Brief

Counsel for Laburnum have placed in their brief as Appendix C (brief, App. 7) a reprint of an article of The Saturday Evening Post. Petitioners submit that the matters therein contained are entirely separate and distinct from the instant case and have neither connection with or relevancy to the case at bar. Counsel for Petitioners are certain, too, that this Court will look upon the inclusion of the reprint with the same disfavor as it did prejudicial newspaper comment in *Sheppard* v. *Florida*, 341 U.S. 50, 71 S. Ct. 549 (1951) and *Bridges* v. *California*, 314 U.S. 252, 271, wherein it said that "Legal trials are not like elections, to be won through the use of the meeting hall, the radio and the newspapers." The matters contained in the article do not, it is submitted, come to this Court with the same solemnity as a court record containing factual data given under oath and subject to cross examination, with the right of litigants to be confronted with the witnesses against them. The reprint is irrelevant and impertinent; the Court should order it removed from the brief, and Petitioners so move.

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